

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

No. CR 03-02072 JB

ANTONIUS MARIA HEIJNEN,

Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on the Defendant Antonius Maria Heijnen's Response to Pre-Sentence Report, including objections and comments, filed July 26, 2005 (Doc. 181). The Court held a sentencing hearing on September 23, 2005. The primary issue is whether the Court should overrule Defendant Antonius Maria Heijnen's objections to the Pre-sentence Report. Because Probation, in its Addendum, has addressed most of Heijnen's concerns, and because the United States agrees with two¹ of Heijnen's objections, the Court will sustain some of Heijnen's objections and overrule all others. Consistent with the Court's ruling at the sentencing hearing, and for the reasons given at the time of the hearing, the Court will sustain the objections to paragraphs 58, 69 and 97 of the Pre-Sentence Report. The Court will overrule all other objections.

ANALYSIS

The Court will not discuss each objection, but will discuss those that are most important for proceeding to sentencing.

¹ The United States, at the sentencing hearing, agreed that Heijnen's objections to paragraphs 59 and 97 should be sustained. See Transcript of Sentencing Hearing at 3:19-4:2; 31:19-31:13.

1. Paragraph 69.

Heijnen objects to paragraph 69 of the Pre-Sentence Report, which addresses the recommended two-level enhancement for obstruction of justice pursuant to U.S.S.G. § 3C1.1. Heijnen argues that the enhancement is inapplicable, because he was not charged with obstruction of justice. Heijnen is correct in his factual assertion, but misunderstands the purpose of the guideline enhancement.

§ 3C1.1 provides for a two level enhancement if a defendant “willfully obstructed or impeded, or attempted to obstruct or impede the administration of justice”

At least part of the enhancement’s purpose is to make certain that the advisory guideline sentence that the Court must calculate for his offenses of conviction, and then consider before imposing punishment, adequately reflects his conduct in the course of the investigation and trial of this case. The Court believes, however, that it is not appropriate to increase Heijnen’s offense level for obstruction. The provision on obstruction of justice is not intended to punish a defendant for exercising a constitutional right or to curtail a defendant’s right to attempt to admit evidence or deny guilt at trial. The Court cannot say that Heijnen willfully obstructed or impeded the trial.

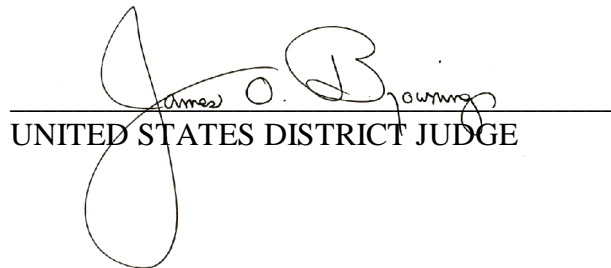
2. Paragraph 97.

Heijnen objects to the statutory maximum term of imprisonment of twenty years for 18 U.S.C. § 1343, as set forth in paragraph 97. Congress amended this statute on July 30, 2002 to raise the statutory maximum punishment from five years to twenty years. The conduct alleged in the First Superseding Indictment occurred before July 30, 2002. The United States therefore agrees that the maximum penalty for Heijnen’s conviction on Count 2 is five years imprisonment.

3. Conflict of Interest.

In footnote three to his objections, Heijnen states that the presiding judge has a conflict of interest. The Court has dealt with this issue in its opinion and order denying Heijnen's motion for a new trial and change of venue. See Doc. 191. The Court incorporates the analysis in that opinion, particularly pages 8 to 10 thereof, and overrules Heijnen's objection.

IT IS ORDERED that the Court will sustain Heijnen's objections to paragraphs 58, 69 and 97 and will overrule all others.



UNITED STATES DISTRICT JUDGE

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